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In the

Supreme Court of the United States

JESSE UPSHER; ANNIE ABRAHAM; EDWARD BRODZIK; JEANETTE BRODZIK; HENRY HUCZEK; AURELIA HUCZEK; STEPHEN KALMUS; CATHERINE KALMUS; KAREN KOHL; TRACY THACKER; JOHN O'LOUGHLIN,

Petitioners,

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTIAN FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are custodial workers, including two students, employed at Grosse Pointe South High School in Grosse Pointe, Michigan in 1995. Petitioners, who include spouses of some workers, were exposed to life threatening levels of asbestos when they were unlawfully ordered, over repeated protests, to prepare a floor containing over 3,000 square feet of asbestos tiles for the new carpet after New York Carpet World walked off the job once it discovered that the tiles contained 25% asbestos. The EPA and the Michigan Department of Public Health issued citations to Respondents, who admitted violating OSHA air monitoring requirements, among others. As a result of the exposure, Respondents require medical monitoring, the cost of which is solely on the backs of Petitioners in the face of the lower court rulings granting summary judgment to Respondents.

1. Whether the judgment of the Sixth Circuit should be vacated and reversed as it is in conflict with other decisions from other Circuits regarding the evidence necessary to circumstantially prove intent in a 1983 action including, but not limited, the Second Circuit's decision in LaBounty v Conklin, infra, a 1983 action involving alleged exposure to asbestos?

2. Whether the judgment of the Sixth Circuit should be vacated and reversed as it is conflict with decisions of this Court and in conflict with applicable Michigan decisions cited as controlling authorities in Petitioners' brief below, but never addressed, discussed or distinguished in the Sixth Circuit's opinion?"

3. Whether the judgment of the Sixth Circuit should be vacated and reversed for "plain error" as it incorrectly found, among other things, that Petitioners' 1983 claim was predicated exclusively on the Due Process Clause when Petitioners argued below that "a plain reading of the statute [1983] indicates that it encompasses deprivations of any rights under all "laws" as well as those under the Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit dated April 4, 2002, is set forth the Appendix, p.1a. The Order of the United States District Court for the Eastern District of Michigan, Southern Division dated May 30, 2000, and the transcript of the court's bench opinion are set forth in the Appendix.

STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit issued its decision on April 4, 2002. This Petition was timely filed.

STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law....

Statutory issues under 42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected,

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Intentional tort exception of Michigan Workers Disability Compensation Act, Mich. Comp. Laws Ann. Section 418.131(1):

> The right to recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exception is an intentional tort.

STATEMENT OF THE CASE

Procedural History

The case was initially before Judge Hood of the U.S. District Court for the Eastern District of Michigan, Southern Division. At the scheduling conference, it was revealed that one of the defense counsel assigned to the case by Respondents' attorneys had clerked for Judge Hood and attended the church where Judge Hood's husband was a minister/member. Judge Hood indicated that she could preside over the case impartially. However, when Respondents filed a motion for summary judgment, Judge Hood inexplicably recused herself and the case was reassigned to Hon. Anna Diggs Taylor.

Judge Taylor denied Respondents' initial motion for summary judgment with respect to Respondents' 1983 claim, stating "as Plaintiffs' counsel has aptly argued, could possibly go forward on a case of deliberate indifference." Following

extensive discovery, including the depositions of Petitioners' experts whose testimony was unrefuted in this case, Respondents filed a renewed motion for summary judgment.

Despite the testimony of the former Head of Industrial Hygiene for Ford Motor Company that the Respondents acted with "total and callous disregard" and "deliberately" exposed Petitioners to respirable asbestos, the trial court concluded that Respondents had not made a sufficient showing of intent to cause harm to establish a 1983 action. Apparently, the trial court was not as shocked as the former Head of Ford Motor Company's Industrial Hygiene at the actions, and just as importantly inactions, of Respondents in this case.

Similarly, the trial court found that Respondents had sustained no injuries as a result of the exposure in the face of the unrefuted testimony from another expert, with a Masters Degree in Public Health from Harvard, whose opinion is that the degree of exposure puts Petitioners, particularly the two students, at "significant risk" of asbestos related disease and necessities annual medical monitoring. The trial court dismissed the damage claims without so much as a scintilla of evidence to the contrary from Respondents.

The medical monitoring costs recommended by Petitioners' expert are staggering. For the two students, such monitoring amounts to over $100,000 during a lifetime. Respondents have steadfastly refused to pay for any monitoring costs. The trial court's decision in this case leaves Petitioners with no source for recovering expenses brought about by Respondents admittedly unlawful conduct.

The trial courts judgment was timely appealed to the Court of Appeals for the Sixth Circuit, which affirmed the trial court's decision. However, in doing so, the Court of Appeals tacitly reversed the trial court's finding that Petitioners had sustained no injuries as a result of their unlawful exposure to respirable asbestos, stating that:

> "[T]he plaintiffs' expert reported that as a result of the exposure, the plaintiffs are at a significant increased risk of developing, *inter alia*, lung cancer, Mesothelioma, kidney cancer, leukemia, and lymphoma – all requiring expensive medical monitoring."

Although it recognized Petitioners' need for "expensive medical monitoring," the Sixth Circuit's decision, like the trial court's decision, leaves Petitioners without any third party source to recoup expenses for expert recommended medical monitoring as Respondents have refused to pay for any such monitoring, even though the monitoring was necessitated by Respondents' admitted violation of applicable federal health and safety laws

Significantly, the Court of Appeals flatly rejected and did even discuss, other than note the existence of, a decision in conflict with its opinion in this case rendered by the Second Circuit in a 1983 action involving exposure to asbestos, stating:

> "The plaintiffs urge that the Second Circuit's decision in LaBounty v Coughlin, 137 F.3d 68 (2d Cir. 1998), requires reversal of the district court's judgment: however we conclude that our decision in Lewellen demands the opposite result."

The Court of Appeals further noted that, unlike the plaintiff who was before this Court in Collins v Harker Heights, 503 U.S. 115, 120 (1992), Petitioners' allegations that Respondents' actions were "willful, wanton, malicious and demonstrated complete, utter and reckless disregard for health and safety" make our a violation of 1983. Specifically, the Court of Appeals stated: "we conclude that a 'fair reading' of the plaintiffs' complaint, unlike the complaint in Collins, does allege a willful violation."

For whatever reason, the Sixth Circuit erroneously concluded that Petitioners' 1983 claim was predicated solely on a violation of the Due Process Clause of the Fourteenth Amendment and not violations of applicable federal laws such as AHERA as well. Respondents' position was clearly articulated in the brief filed with the Court of Appeals and in the trial court, which recognized in denying the initial motion that "So I have to deny the motion on the 1983 claim. It is not simply based on the environmental law statutes, but on the law of deliberate indifference as well." (Tr 11-15-99 at 57: JA pp 407-422).

The Court of Appeals was equivocal about the precise standard to be applied in a 1983 action. It questioned, but never stated, whether the "deliberate indifference" standard suggested at the trial court level by Respondents and used by the trial court in granting summary judgment was applicable, stating that "the more exact standard was arbitrary conduct designed to punish or conscious shocking behavior." A fair reading of the opinion truly leaves one wondering what standard to apply in future cases.

Like the trial court, the Court of Appeals ignored the unrefuted testimony of the former Head of Industrial Hygiene for Ford Motor Company and Professor at Wayne State Medical School that the Respondents actions in this case were "with total and callous disregard for grave human health hazards [and] with cavalier disregard for that hazard and deliberately exposed these gentlemen." Although Mr. Wabeke testified that not once in his 30 plus year career had he "observed such disdainful behavior by managers of an ACM [asbestos containing materials] facility where armed with clear evidence of the presence of ACM, proceeded to place workers in harm's way by skirting the regulations and ducking the law," the Court of Appeals did not even discuss application of the "conscious shocking" standard articulated in the decision.

With respect to Petitioners' contention that the intentional tort exception to Michigan's Workers Disability

Compensation Act applied to their state law claims, the Court of Appeals recognized that Petitioners' exposure to over 3,000 square feet of tiles containing 25% asbestos during the 10 day period the job was performed could constitute a "continually operative dangerous condition." In such circumstances, the Michigan Supreme Court has held that an employer has a duty to inform workers about the dangerous condition so that they might take steps from being injured.

The Court of Appeals, however, found "no evidence" in the record that Respondents knew of a condition that would cause injury and refrained from informing Respondents. This finding, like others, is baffling in light of the uncontested fact that the two students who were employed for the summer were not informed until 5 months after the job that the tiles they were tearing up with knives, hammers and shovels contained asbestos. Some full time custodians were not aware until government investigations commenced, as they never even received notification from Respondents.

Without such basic knowledge, students John O'Loughlin and Jessie Upshur and other workers most of who knew little more than the students, could not and did not take any measures to protect themselves and were exposed to unlawful levels of breathable asbestos, necessitating medical monitoring that the school system now will not provide. Even when the students were informed, the letter conveying such information was misleading, stating, among other things that the "appropriate tests were taken" when, in fact, no air monitoring was performed during the 10 day removal process. The students bore the bulk of the heavy work like hammering and chiseling of tiles containing 25% asbestos, as they were young summer help and others sweeping up asbestos fibers by hand with no respirator or other protection did not know any better themselves or else they and the students would not have been playing "Russian Roulette" with tiles containing 25% asbestos, which was declared by Congress to be a "dangerous toxic chemical" and was listed as a "hazardous air pollutant" in the regulations to the Clean Air Act. 36 Fed. Reg. 5931 (1971).

Defendants Were Well Aware of the Ultra Hazardous Nature of Asbestos

The Grosse Pointe Public School System ("GPPSS") was well aware of, but did not communicate to workers, principals, teaches, parents and students, the hazards associated with working with asbestos containing materials as well as applicable federal and state laws, rules and regulations. Indeed, the Grosse Pointe Public School System received a pamphlet entitled the "ABC's of Asbestos in Schools" published by the EPA, National Education Association and National Parent Teacher Association 6 years prior to Plaintiffs' unlawful exposure. Page 17 states, in part, that "an ill-conceived or poorly conducted removal can actually increase rather than eliminate risk." Had Respondents minded the ABC's set forth in the manual, Petitioners would not be before this Court.

Other incriminating documents in Defendants' files included materials from a training seminar sponsored by the Institute for Environmental Assessment, and attended by Defendant Fenton, Asbestos Manager for the Grosse Pointe Public School System, five years prior to the incident in question. (R36: Brief in Support, Exhibit 6 –Training Book from Institute of Environmental Assessment and Exhibit 7-Fenton Dep p12; JA pp269-282 & 518-530). With respect to the risks associated with low-level exposure, the materials confirmed, and Defendants were thus acutely aware, that "asbestos is known to be hazardous" and that "there is no level of exposure below which the risks of contracting an asbestos related disease are not zero. That is, there is no threshold level of exposure."

In what has to be shocking to any reasonable person, Asbestos Manager Fenton did nothing, until after the unlawful asbestos exposure, to convey such information to Petitioners. In fact, the school system was cited by the EPA for failure to notify teaches, workers, parents and students of the location of a plan showing asbestos containing materials in the school. Assistant Principal Pagel, who ordered the job

done, did not even know that there was such a thing as a plan showing the location of asbestos containing materials throughout the school, which literally ranged from floor (the tiles in question) to ceiling (the tiles in the gym that were occasionally disturbed during gym, etc.). (R.36: Brief in Support, Exhibit 8 – Kohl Dep p21; JA pp622-643).

The seminar materials specifically warned attendees like Asbestos Manager Fenton, who were becoming certified managers of asbestos containing public facilities, that:

> "Use of in-house staff in lieu of outside experts may be a serious mistake and may result in legal liability if the in-house staff is unqualified. AHERA Regulations require that all maintenance and custodial personnel receive at least 2 hours of awareness training, with an additional 14 hours of training mandated for personnel whose work activity may disturb asbestos." (Emphasis added).

Despite being now warned at least twice about the dangers of letting untrained workers handle asbestos materials, Asbestos Manager Fenton never promulgated any rules, regulations or procedures nor did he issue any warnings or instructions about asbestos containing materials until **after Plaintiffs** were unlawfully exposed to asbestos. Ironically, the Grosse Pointe Public School System was cited by the EPA and admitted responsibility for violating the very AHERA regulations Asbestos Manager Fenton had studied at a seminar 5 years earlier when he became certified and had read about 6 years earlier in the ABC's of Asbestos in Schools. A more callous disregard for worker health, safety and welfare is had to imagine, particularly when it involves a carcinogenic substance like asbestos that is life threatening even in the case of low level exposure.

The Unlawful Removal of Asbestos Floor Tiling

In 1995, it was decided that the main office area at Grosse Pointe South High School ("South") would be re-carpeted. To that end, Defendant Paul Pagel (Assistant Principal) was given the task of selecting and installing new carpet. Mr. Pagel chose New York Carpet World (NYCW), which came out to the job site and took a sample of the tiles underlying the carpet. NYCW subsequently walked off the job and refused to rip up the old carpet and prepare the floor for the installation of new carpet because the underlying floor tiles contained asbestos. (R.21: Brief in Support, Exhibit 17-Findings of MIOSHA and Exhibit 13-Memo Fenton to Shine; JA pp326-330 & 321-323).

Following NYCW's refusal to prepare the floor for new carpet installation, Assistant Principal Pagel did absolutely nothing to ascertain whether any other licensed and trained outside contractor would prepare the floor for new carpet installation as the school had done in the past when it knew beforehand that the floor tiles contained asbestos. Incredibly, Assistant Principal Pagel did not even bother to consult with anyone within the school system such as Asbestos Manager Fenton or Superintendent of Buildings Yankauskus, despite admittedly knowing that the floor tiles contained asbestos and that NYCW would not touch the job. (R.36: Brief in Support, Exhibit 3-Yankauskus Dep. and Exhibit 12-Pagel Dep.; JA pp693-703 & 644-661).

Instead of taking any precautionary measures, and in the face of NYCW's flat out refusal to perform the work, Assistant Principal Pagel ordered the custodial workers at South High School, who included two students, John O'Loughlin and Jesse Upshur, to prepare the floor for new carpet installation. Significantly, Pagel did not tell any of the Respondents that the tiles had tested positive for asbestos or that New York Carpet had walked off the job because 25% of the floor tiles were asbestos. He simply threatened and intimidated them into doing the job, and at no time gave them any "heads up" as to the presence of asbestos in floor tiles that they would have to come into contact in order to start the job of removing the old carpet and the tack board and such nailed

into the tiles, one-fourth of which contained a substance to which there was no safe level of exposure, a fact Congress recognized a quarter of a century earlier.

Pagel did not know whether the custodians had proper training to handle a known carcinogenic substance – they did not and federal and state officials thereafter cited the school because they did not. When told to perform the work, Steve Kalmus (Foreman) immediately raised a concern about exposure to asbestos fibers and protested the job to Pagel. Three other custodians overheard Kalmus' protest and reported it to the EPA investigator. (R.36: Brief in Support of Response, Exhibit 11 – EPA Investigation and Exhibit 12 Pagel Dep; JA pp348-366 & 644-661).

Despite Kalmus' protest, and without checking any further with anyone in the school system, Pagel directed Head Engineer Jay Jeffrey and foreman Kalmus to have the workers prepare the floor for new carpet installation. He did so knowing full well that the job entailed contact with asbestos containing floor tiles that could release airborne asbestos fibers, which caused cancer. (R.36; Brief in Support, Exhibit 12-Pagel Dep; JA pp644-661). Pagel did not even stay around while the work was performed but promptly left for vacation and was unreachable thereafter. (R.21: Brief in Support, Exhibit 16-Jeffrey Notes; JA p325).

Before the job began, another one of the custodians, Charles Eriksen, asked the principal's secretary to contact the Central Office where the Asbestos Manager, Building Superintendent and Board of Education were housed. Mr. Eriksen wanted a letter of assurance that the removal was safe in regard to the health and welfare of the parties involved. No response was forthcoming. (R.36: Brief in Support, Exhibit 3-Yankauskus Dep, and Exhibit 11- EPA Investigation; JA pp693-703 & 348-366).

According to the principal's secretary, Tudi Harwood, she and Defendant, Jay Jeffrey (Head Engineer), reviewed regulations published by the Michigan equivalent of OSHA

before and after the job was started, which regulations contained OSHA's air monitoring requirement violated here. Despite having done so, and asbestos training two years earlier, Head Engineer Jeffrey, who was in charge of the project, did nothing to halt the protested job but waltzed right ahead and oversaw the violation of the MIOSHA book he had consulted twice as well as federal laws like AHERA which also were admittedly violated in this case. (R36: Brief in Support, Exhibit 1-Harwood Dep; JA pp531-546). Like Assistant Principal Pagel before him, Head Engineer Jeffrey had little or no concern for the welfare and being of the workers beneath him. He testified at his deposition that if he had it to do it all over again, he would run the floor preparation job the same way.

Midway through the project, Tudi Harwood, called defendant Yankauskus (Building Superintendent) and asked him to come over to South High School and look into concerns Plaintiffs were then expressing for a third time over the exposure to asbestos R.36: Brief in Support, Exhibit 1, Harwood Dep. pgs 24- (25; JA pp531-546). Building Superintendent Yankauskus went to South High School and spoke briefly with the principal and her secretary but did not even enter Plaintiffs' work area and did not attempt to approach Plaintiffs (R.36: Brief in Support, Exhibit 3, Yankauskus Dep; JA pp693-703).

Yankauskus did virtually nothing about halting the job, which he admittedly knew NYCW refused to perform. He also knew that the job was "dangerous," and attempted to contact Asbestos Manager Fenton and Assistant Principal Pagel "about a situation that could be hazardous" (R, 36: Brief Support, Exhibit 3, Yankauskus Dep p66; JA pp693-703). Superintendent of Buildings Yankauskus was unsuccessful in reaching Fenton or Assistant Principal Pagel and did nothing else - such as telling the workers in front of him that the job was "dangerous" and "could be hazardous." As a result, Plaintiffs continued to be exposed to asbestos in excess of EPA's permissible exposure limit as they completed the floor preparation work in further violation of federal health and

safety laws like AHERA, which Yankauskas, as one certified in the 14 hour asbestos awareness class that even Head Engineer Jeffrey had not yet taken, clearly knew as he confessed in the trial court were "dangerous" and "hazardous."

The entire project took up to ten days and involved 3,000 square feet and eight to ten rooms. Some floor tiles started coming up immediately with the carpet. Other floor tiles stuck and had to be removed by hand with hammers, chisels, etc. One of workers used a jackhammer during the removal process. According to an EPA investigator, the use of such a device would be assumed to have resulted in the release of "friable" asbestos and a response item triggering a host of mandatory actions mandated by AHERA and other asbestos related laws.

Head Engineer Jeffrey himself used an ice spud to pulverize the tiles. Because they were so ill trained, Petitioners were not even aware that they were engaging in unsafe work practices and exposing themselves to cancer causing fibers. (R.36: Brief in Support, Exhibit 11-EPA Investigation; JA pp348-366). The students were not informed beforehand and did not know that they were handling floor tiles containing asbestos until 5 months later when Respondents sent a self-serving and misleading letter that told them there was nothing to worry about as "all appropriate testing" had been done, when, in fact. Federally mandated air monitoring had not been performed. As amazing as the tardiness of the letter to the students may seem, some workers did not yet received any notification from the Grosse Pointe Public School System and only learned of their exposure once governmental investigations were getting underway.

One worker has stated that he and Plaintiff John O'Loughlin, a student with absolutely no asbestos training, "chipped, pounded and pulverized the broken tiles into 10,000 pieces" thereby causing the asbestos in the tile to become "friable" or airborne and breathable. Another worker who

hand swept the dust from the project had a bag break and cover his head with asbestos when he went to throw it in a dumpster.

All workers agree that the conditions were unbearable as they were inundated with dust and debris from the tiles containing 25% asbestos. (R.36: Brief in Support, Exhibit 11-EPA Investigation and Exhibit 14- Excerpts from Plaintiffs' Deps; JA pp 348-366 & 462-481, 547-562, 581-616 and 622-643). The workers were not provided with any protection whatsoever such as respirators or disposable clothing and no equipment such as a HEPA vac to collect the asbestos fibers otherwise circulating throughout the school building. (R.36: Brief in Support, Exhibit 15, 2-9-96 Letter from Sue Baldwin; JA pp326-330). Under regulations pending at the time, of which the Grosse Pointe Public School System was fully aware, Respondents would have violated six additional regulations requiring such basic safety equipment as air monitors, barriers for containment and respirators for workers, bold warning signs of *"HAZARDOUS MATERIAL"* surrounding the workplace and a HEPA vacuum to collect asbestos fibers that had been released rather than the hand brooms used by some.

Defendants Admittedly Violated Federal and State Laws

At the insistence of Plaintiffs, a complaint was lodged with the Michigan Department of Public Health on or about December 13, 1995. The complaint resulted in an investigation by the Department of Public Health. Citations were subsequently issued for: (1) failure to perform exposure monitoring required by the Federal OSHA Asbestos Construction Standard and (2) failure to instruct employees in the recognition and avoidance of unsafe conditions involving asbestos. Defendants would have received an additional six citations if pending regulations, of which they were fully aware, had been in full force and effect. (R.36: Brief in Support, Exhibit 15-MIOSHA Letter and Exhibit 18-Complaint; JA pp341-343).

At Plaintiffs' request, a representative of the U.S. EPA also conducted an inspection of the tile removal in question to determine compliance with applicable federal laws, rules and regulations. The inspection resulted in the issuance of a Notice of Noncompliance for Violation of 40 C.F.R. The investigator found that: (1) the custodial supervisor and workers who removed the asbestos containing floor tile had not received the 14 hours of asbestos training required before conducting such activities; (2) the bulk samples of suspected asbestos material were not collected by the school by an accredited inspector; (3) bulk samples collected by the school were not analyzed by an accredited facility; and (4) written notices to parent, teacher and employee organizations did not specify as required by law where the schools asbestos management plans were available for review (perhaps explaining why Assistant Principal Pagel did not know the school had a plan, such as it was). (R.36: Brief in Support, Exhibit 11-EPA Investigation and Exhibit 19-Notice of Non-Compliance; JA pp 344-366).

Plaintiffs Were Deliberately Exposed to Asbestos Containing Floor Tiles

In support of their claims, Plaintiffs retained the services of Roger Wabeke, former Supervisor of Industrial Hygiene for Ford Motor Company and a Professor of Industrial Hygiene and Environmental Toxicology at Wayne State School of Medicine (R.35 and 36: Response and Amended Response, Wabeke Expert Report and Dep; JA pp180-197&665-692). Mr. Wabeke's testified:

> "You [counsel for Defendants] might have to guess. I can give an opinion based on my experience. *** I don't want the record to reflect that I'm speculating or guessing or just pulling numbers out of the hat. I gave you my estimates based on the facts as I understood them to be coupled with my experience and education and training taking literally thousands of air samples, many of which were

at VAT [floor tile] removal. I'm giving you an informed judgment call based on those factors.

***

In spite of laboratory analytical testing demonstrating the presence of chrysotile asbestos fibers in the floor tiles, responsible individuals in the administration of Grosse Pointe South High School egregiously, and with total and callous disregard for the grave human health hazards of asbestos fiber inhalation, elected not to comply with OSHA regulations.

***

Your client botched the job from get to go. They had advance knowledge of the hazards of asbestos fiber exposure. And armed with that knowledge they proceeded to waltz right ahead and deliberately expose plaintiffs in this action to a Class A carcinogen, which was easily controlled by standard industrial hygiene practices that have been known and recognized for decades. These exposures were preventable, and I'm going to repeat your client botched it completely. The school was on notice from New York Carpet World that this was an incredibly hazardous project and they proceeded to act with cavalier disregard for that hazard and deliberately exposed theses gentlemen.

***

Based on my review of the work practices and the absence of industrial hygiene control methods, it's clear to me that these individuals had excessive exposures, in excess of the permissible limit-PEL, as we call it, or as OSHA calls it. (R.35 and 36: Response and Amended Response, Wabeke Expert report and Dep; JA pp180-197 & 665-692)."

Plaintiffs Uncontoverted Injuries

Several of the Plaintiffs have developed respiratory problems, which they did not have prior to being illegally exposed to asbestos. One of the Plaintiffs, Stephen Kalmus, has been so traumatized by the events surrounding this matter that he suffers from posttraumatic stress syndrome, cannot work and is on social security disability. It is a matter of record in the Circuit Court for the County of Wayne in Wayne County, Michigan, that upon hearing the trial court's ruling first hand, Mr. Kalmus was finally pushed over the top, threatened physical violence for which the Grosse Pointe Public School System sought and obtained a TRO and subsequently was hospitalized for medical treatment (R.36: Brief in Support, Exhibit 20, Kalmus Dep pp5, 6 and 21; JA pp581-616).

According to expert Dr. Ernest Chiodo, who has a degree in internal medicine from Wayne State University as well as a Masters in Public Health from Harvard University:

> "However, ultimately, when OSHA derives a permissible exposure limit in their great wisdom, they look at such things as relative risk, I look towards some guideline, some guidance from OSHA, and OSHA says exposure above the permissible limit exposes these people to risks and therefore I have to make decisions based upon that."

In the opinion of Dr. Chiodo, Petitioners are at a "significant increased risk" of a number of diseases including, but not limited to: asbestosis, lung cancer, mesothelioma, kidney cancer, leukemia and lymphoma. With the exception of asbestosis, there is considered to be no threshold level for development [of asbestos related diseases] I mean, one good breath of asbestos can cause the development of [diseases]. There is no dose response relationship with asbestos and [asbestos related diseases]" (R.38: Amended Response-Chiodo Expert Report and Dep; JA pp 204-225 & 482-517).

In view of their uncontested exposure to respirable asbestos fibers in excess of legal limits, Plaintiffs' expert recommends that they undergo medical surveillance. As Dr. Chiodo opined:

> "The fact that one is exposed to a level, above what OSHA believes is permissible, exposure limit indicates for my purposes as an occupational environmental medicine doctor, that I can safely provide an opinion that these individuals require medical monitoring. (R.36 and 38:Response and Amended Response-Chiodo Expert Report and Dep; JA pp 204-225 & 482-517).

Some of Plaintiffs are undergoing monitoring now. Others cannot afford such costs. The lifetime cost of such monitoring ranges from $100,000.00 in the case of student Plaintiffs to $40,000.00 and up for adult Plaintiffs. (R.36 and 38: Response and Amended Response-Chiodo Report; JA pp204-225). Defendants again presented no evidence in the trial court that medical monitoring was not the prudent thing to do under the circumstances, given Plaintiffs' daily exposures, for perhaps as long as 10 days, to levels of asbestos exceeding EPA's permissible limit.

After supposedly looking at the evidence in this case inn the light most favorable to Respondents, for starters, the Sixth Circuit affirmed the decision of the trial court, leaving Petitioners, coming before this Court in the inequitable position of having been exposed to life threatening levels of asbestos by Defendants in violation of applicable federal laws such as AHERA, but without any source to obtain expert recommended medical surveillance other than their own pockets. In this regard, the Grosse Pointe Public School System has denied former student John O'Loughlin any further workers compensation benefits unless he can show a lung related disease (by which time he will probably be dead if he inhaled a fiber that developed into such a disease).

What the Court of Sixth Circuit essentially did was to weigh the parties' conflicting interpretations of the evidence and make determinations regarding matters such as the Defendants' intentions or motives that usually entail the drawing of factual inferences over which reasonable minds can differ. Courts have traditionally found that issues such as a party's knowledge of a dangerous condition, appreciation of prospective harm and/or awareness of the certainty of harm, among a multitude of others, are inappropriate for resolution by summary judgment.

Unlike most courts, the Sixth Circuit in this case obviously did not feel so constrained and issued an opinion reflective of the kind of tortured reasoning one has to go through, and incorrect assumptions one has to make in order to summarily dismiss the unrefuted testimony of Petitioners' experts on core issues like intent and grant summary judgment to Respondents' admitted violations of federal health and safety laws going to the heart of this case like air monitoring, training and notice to Respondents and teachers, parents, students and others of the location of asbestos containing materials in a school which was riddled with such materials. There is a plethora of flawed assumptions and reasoning in the Sixth Circuit's decision, which will be more fully explored if permitted by this Court. The opinion issued by the Sixth Circuit is contrary to decisions of this Court, other Circuit Courts, the Supreme Court of Michigan and contrary to basic notions of justice. Certiorari is therefore respectfully requested from this Court.

REASONS FOR GRANTING WRIT

The petition should be granted for three reasons. First, the Sixth Circuit's decision conflicts with holdings of this Court and other circuits. Indeed, the Sixth Circuit took pride in shooting down a decision from the Second Circuit that Petitioners had relied upon since it involved a 1983 action and asbestos exposure, just like this case. The major differences between this case and LaBounty, which involved

a prisoner who claimed exposure to asbestos from work done on pipe near his cell, are that Petitioners in this case have unrefuted expert testimony regarding liability and damages, admitted violations of governing federal laws, while the plaintiff in LaBounty did not. The results of circuit court cases are just as dramatic – a denial of Defendants motion for summary judgment in the Second Circuit's decision in LaBounty and the granting of summary judgment by the Sixth Circuit in the case at bar. Surely, this is a conflict needing resolution by this Court as well as the proper standards to be applied in 1983 actions throughout the United States of America.

Second, the Sixth Circuit's decision is in conflict with decisions of this Court as well as decisions of the Michigan Supreme Court, including its holding in Travis v Dries and Krump Mfg. Co., 453 Mich 149 (1996) that Michigan's Workers Compensation Act should not be construed in a way so as to confine an employer's liability "to those situations that are true intentional torts" and did not intend the threshold to be "so rigorous as to preclude all claims of intentional tort." One is hard pressed to reconcile the result in this case with the Michigan Supreme Court's admonition. For this and other reasons, review should be granted to correct the defects in the Sixth Circuit's opinion and to enunciate the proper standard required in a 1983 action, as the Sixth Circuit seemed unclear on the matter when issuing its opinion in this case.

Third, the Sixth Circuit committed plain error in this case. Among other things, the Sixth Circuit incorrectly assumed in its opinion that Petitioners' 1983 actions was predicated solely on the Due Process Clause. In fact, Petitioners argued in their appellate brief below that their 1983 claims were also based on Respondents' violations of federal health and safety laws. The trial court certainly was aware of Petitioners' claim, as it stated as follows in denying Respondents' initial motion for summary judgment: "So I have to deny the motion on the 1983 claim. It is not simply based on environmental law statutes, but on the law of deliberate indifference itself."

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits And Of The Michigan Supreme Court

The Sixth Circuit's opinion acknowledges a conflict with the Second Circuit's decision in LaBounty, which involved a 1983 action brought by a prisoner for alleged exposure to asbestos when pipes around his cell were repaired. In no uncertain terms, the Sixth Circuit flatly rejected the reasoning of the Second Circuit on a 1983 claim involving exposure to asbestos, refusing to even discuss or distinguish a case involving summary judgment and identical issues of law and fact. However, both claims are alike in that they involve duties owed to third persons by persons in control of asbestos containing facilities such as a prison or school constructed when asbestos was an ingredient in everything from floor tiles to ceiling tiles. This acknowledged conflict obviously needs resolution by this Court so that the proper standards to be applied in 1983 actions like this one are uniformly applied and do not depend on whether one is a prisoner in New York or a custodian in Grosse Pointe, Michigan (although for purposes of this case, the custodians would have been better off prisoners in New York).

Beyond the acknowledged conflict with the Second Circuit, and the need to reconcile the Sixth Circuit's opinion with holdings of this Court on material issues in this case, the decision of the Sixth Circuit tramples Michigan law and decisions of the Michigan Supreme Court and the appellate courts of Michigan. In this regard, it merits emphasis that the Sixth Circuit did not address or attempt to distinguish the Michigan authorities which Petitioners' contended in their appellate brief below mandated reversal of the trial court's decision granting summary judgment, other than the Michigan Supreme Court's decision in Travis.

The Sixth Circuit agreed with Petitioners that one of the core holdings in the Michigan Supreme Court's ruling in Travis could arguably apply to the facts of this case. In Travis,

the Michigan Supreme Court held that when an employer subjects an employee to a continuously operative dangerous condition that it knows will cause injury (demolition of asbestos tiles), yet refrains from telling the employee of the dangerous condition so that he is able to take steps from being injured, a fact finder may conclude that the employer had knowledge that an injury was certain to occur.

While the Sixth Circuit acknowledged the applicability of the holding in Travis to this case, it found that "there is no evidence that that any of the defendants knew this condition would cause injury and refrained from informing the plaintiffs." Such could not be further from the truth. Asbestos Manager Fenton knew from training seminars in becoming certified and reading the ABC's of Asbesto in Schools that use of in-house and untrained workers could lead to the very situation present here, but did not undertake to issue policies or procedure about the hazards of asbestos or handling asbestos-containing material until after Petitioners were ordered to perform work over protest that resulted in their exposure to asbestos fibers in excess of the EPA's allowable limit. Petitioners were thus unaware of the hazardous nature of the work that they were performing.

Certainly, no one in their right mind would take hammers, chisels, ice spuds and even a jackhammer to remove asbestos tiles knowing a small fraction of what should have been told to them by the person in charge of Asbestos Management, Christian Fenton as well as others. Things such as that Congress has know for 25 years that there is "no safe level" of exposure and what to do if asbestos containing materials are encountered, which is in the ABC's of Asbestos put out by the EPA, National Education Association and National Parent Teacher Association.

Similarly, Building Superintendent Yankauskus knew that a professional carpet company had refused the job because the floor tiles contained asbestos and was called over to the job site by the principal's secretary because of concerns workers were having for a third time about exposure to

asbestos from the floor tiles half-way through the tile removal. Tellingly, he admitted that the job was "dangerous" and that he attempted to contact Asbestos Manager Fenton about "a situation that could be hazardous." However, Petitioners were never made privy to such information since the Building Superintendent did not even give them the time of day but stood off to the side with the principal when he visited the school because of worker concerns about exposure to asbestos. Had he told Petitioners that the job was dangerous or that the situation could be hazardous, they would have never continued to remove asbestos tiles in a cave man like fashion with pick, shovels and whatever else they could lay their hands and continued to expose themselves to life threatening, friable asbestos fibers exceeding EPA's permissible exposure limit.

Assistant Principal Pagel knew when he ordered the floor preparation work done by untrained school custodians that a national carpet company refused the work due to the presence of asbestos in the floor tiles underneath the old carpet that had to be ripped out prior to the installation of new carpet. He never advised any of the Petitioners that tile samples had tested positive for asbestos or that New York Carpet World had declined the work and that they would have to do it. Thus, even foreman Kalmus was kept in the dark about the fact that the tile contained 25% asbestos.

Pagel also knew that if asbestos fibers in the floor tiles were released during the removal process, they could lodge in the lungs and cause cancer, yet never so informed Petitioners. Instead, Pagel conveyed the impression that there was nothing to be concerned about in removing the old carpet and preparing the floor for the installation of new carpet. Had Pagel been forthright, Petitioners would have been aware to take steps to protect themselves and certainly not used everything from a jackhammer to an ice spud to tear up the floor tiles in a manner certain to cause the release of friable asbestos fibers and potentially kill themselves.

Last, but not least, is Head Engineer Jeffrey, who read not once but twice the MIOSHA rules and regulations regarding the handling of asbestos containing materials like the floor tiles including the air monitoring required by OSHA. Not to be deterred, he went ahead and presided over an egregious violation of fundamental safety principles known for a quarter of a century before the job in issue. Like Assistant Principal Pagel, Petitioners were not even aware that the school had an asbestos plan. None of them knew for certain at the time that the tiles contained asbestos. Unlike the Head Engineer, none of them knew that MIOSA rules and regulations existed and thus were unable to avail themselves of the opportunity to take precautions for themselves as Respondents clearly were not taking any on their behalf. Again, there is a direct correlation between the actions/inactions of Respondents and the Petitioners' unlawful exposure to levels of asbestos fibers exceeding the EPA's permissible limit. If Respondents cannot make out a failure to train case here, then it is impossible for any such action to be viable under the Sixth Circuit's ruling.

As demonstrated above, the Sixth Circuit's conclusion that there was no record evidence that any of the Respondents had knowledge of a "dangerous condition" and "refrained from informing" Petitioners is, simply put, wishful thinking. This conclusion served as the underpinning for the Sixth Circuit's decision not to apply the holding of Golec to this case and not to give Petioners' an opportunity to present their case to a jury. Since the Sixth Circuit's application of the Michigan Supreme Court's decision in Travis to the facts of this case is flawed, the result in this case is similarly flawed and in conflict with the Travis.

It is well established that the fact that circuit courts have reached conflicting results on an issue like the proofs necessary to show intent in a 1983 action is a substantial reason for granting certiorari under Supreme Court Rule 10. Yee v Edcondido, U.S. (1992). This Court may also grant certiorari where, as here, there is a need to resolve a conflict between a circuit court and a state court of last resort or

where a lower court has decided a federal question in a way that conflicts with applicable decisions of this Court. For all these reasons, the petition in this case should be granted.

II Certiorari Is Warranted Because The Decision Below Is Predicated on Plain Error

The Sixth Circuit's finding that the sole basis for Petitioners' 1983 claims is the Due process Clause is without any support in the record and belied by the undisputed facts in this case. Unlike the plaintiff before this Court in Collins, Petitioners in the case at bar have never argued that that their 1983 claims were limited to constitutional violations. Rather, Petitioners have consistently maintained that their 1983 claims are also based on Respondents' admitted violations of federal statutory laws like OSHA mandated air monitoring and did so at pages 18-19 of the appellate brief filed below.

Besides overlooking the arguments made in the appellate brief below, the Sixth Circuit's finding overlooks the fact that a statutory basis for a 1983 claim was argued to the trial court, which agreed with the argument, stating "So I have to deny the motion on the 1983 claim. It is not simply based on the environmental law, but on the law of deliberate indifference as well." It is difficult to comprehend how the Sixth Circuit could have ignored arguments explicitly made to it by Petitioners and the trial court record. In any event, the Sixth Circuit's failure and or refusal to consider arguments properly before it is plain error.

In rendering its decision, the Sixth Circuit pretty much ignored or overlooked the Michigan cases cited as controlling authorities in Petitioners' brief below with the exception of Travis. The Sixth Circuit agreed with Petitioners that the holdings of the case applied to the case at bar, but misapplied Travis when it took it upon itself to determine one of the central issues in this case -the existence and weight of evidence concerning Respondents' knowledge of a dangerous condition and failure to inform Petitioners of same. As

discussed above, there is evidence in the record from which a juror could find that each of the individual Respondents was aware of "dangerous" conditions and failed to provide Petitioners with information necessary for them to take precautions for their health, safety and welfare, particularly since Respondents were not looking out for the safety and welfare of Petitioners.

The Sixth Circuit's reluctance to deal with the remainder of the Michigan authorities cited as controlling authorities in Petitioners' brief below is understandable. There simply is no rational basis for distinguishing the cases cited by Petitioners like: (1) the Michigan Supreme Court's case in Travis, which as discussed above, if properly applied to this case would mandate reversal of the trial court's decision regarding application of the intentional tort exception; (2) Palazzola v Karmazin, 223 Mich App 141 (1997), which involved a toxic exposure by workers to a substance that could be harmful or fatal if ingested or inhaled, and the court held that a supervisory employee, and the employer, could be deemed to have "actual knowledge" that an injury was certain to occur if a supervisor knew of the dangers of TCE, knew that the TCE was contained in the water tank and ordered crew members to make contact with sludge in the tank despite their hesitation (the precise situation present in this case with respect to asbestos); and (3) Gulden v Crown Zellerbach Corp., 890 F.2d 195 (9th Cir 1989), cited with approval by the Michigan Supreme Court as an example of a case that met Michigan's intentional tort exception and involving a situation where workers were ordered to scrub a floor knowingly containing PCB's without any protections or safeguards after a hazardous waste specialist was unsuccessful in removing the PCB's (just as Petitioners were ordered, over protest, to perform floor preparation work on asbestos tiles that a national carpet specialist in such matters walked away from).

While this Court normally defers to the construction of a state statute given by lower federal courts, such deference is

not invariably the case, and this Court is particularly reluctant to so defer where the lower courts have fallen into "plain error." Frisby v Schultz, 487 U.S. 474 (1988). Here, the Sixth Circuit misapplied the Michigan Supreme Court's decision in Travis, based on the erroneous assumption that there was no evidence to support a jury finding that Respondents knew of a dangerous situation and failed to inform Petitioners so that that could take steps to protect themselves.

In addition, the Sixth Circuit ignored and/or overlooked controlling Michigan precedent cited in Petitioners appellate brief, which also constitutes "plain error." It has been recognized that special and important reasons for the grant of certiorari are present when lower federal courts have deprived litigants of their right to a jury determination. Rogers v Missouri P. R. Co., 352 U.S. 500 (1957).

CONCLUSION

Supreme Court Rule 10, which discusses the considerations governing the grant or denial of certiorari, emphasizes the necessity of a substantial question before certiorari will be granted. It declares that certiorari will be granted "only when there are special and important reasons" therefore, that as to Federal Courts of Appeal, certiorari may be granted to resolve conflicts between circuits and that certiorari may be granted to settle "important" federal law issues.

There are "special and important" reasons for granting certiorari in the case at bar. Indeed, this case cries out for intervention by this Court. Among other things Petitioners have been exposed to friable asbestos in quantities exceeding the EPA permissible exposure limit for 10 days in violation of federal laws requiring air monitoring and training like Asbestos Manager Fenton received 5 years prior to the incident at issue in becoming a certified asbestos manager, yet are without any remedy for covering the cost of medical

monitoring recommended by expert with a Masters Degree from the Harvard School of Public Medicine. Beyond Petitioners, the Courts and litigants throughout the Country need to know whether to follow the Second or Sixth Circuit decision on issues involving intent in a 1983 action so that justice does not depend on where you live or are a prisoner in New York or student summer help in Grosse Pointe, Michigan. Standards obviously need to be articulated further as the Sixth Circuit appeared confused as to what standard applied and when.

The Sixth Circuit's opinion that there was "no evidence" to support a jury finding that Respondents were aware of a dangerous condition and did not inform Petitioners so that they could take care of themselves is preposterous and contrary to the unrefuted testimony of Petitioners' experts and the fact that not a single one of the Petitioners was told beforehand that the tiles had tested positive for the presence of asbestos or to take any special precautions. Similarly, the Sixth Circuit's determination that Petitioners' 1983 claims were based solely on the Due Process Clause is legal legerdemain at its best and contrary to the arguments made in Petitioners' Appellate brief below and the trial court record where the court took note that Petitioners' 1983 claims were not predicated exclusively on environmental laws. Plainly, the Sixth Circuit has reversibly erred in making such determinations and others.

Finally, the decision in this case is contrary to the Michigan Supreme Court's admonition in Travis that the intentional tort exception was not to be construed so rigorous as to preclude all claims of intentional tort and was not limited to "true" intentional tort cases. The Sixth Circuit's decision in this case virtually eliminates the exception. For all the reasons noted herein, Petitioners pray that their writ of certiorari be granted.

Respectfully Submitted,

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(any footnotes trail end of each document)
Nos. 00-1763 / 00-1764 / 00-1765

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESSE UPSHER; ANNIE ABRAHAM; EDWARD BRODZIK; JEANETTE BRODZIK; HENRY HUCZEK; AURELIA HUCZEK; STEPHEN KALMUS; CATHERINE KALMUS; KAREN KOHL; TRACY THACKER; JOHN O'LOUGHLIN, Plaintiffs-Appellants,

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTIAN FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities, Defendants-Appellees.

January 29, 2002, Argued

April 4, 2002, Decided

April 4, 2002, Filed

COUNSEL:
ARGUED: Philip E. Chaffee, LAW OFFICE OF PHILIP E. CHAFFEE, Grand Rapids, Michigan, for Appellants.

Timothy D. Wittlinger, CLARK HILL PLC, Detroit, Michigan, for Appellees.

ON BRIEF: Philip E. Chaffee, LAW OFFICE OF PHILIP E. CHAFFEE, Grand Rapids, Michigan, for Appellants.
Timothy D. Wittlinger, Evelyn L. Sullen, CLARK HILL PLC, Detroit, Michigan, for Appellees.

JUDGES:
Before: RYAN and GILMAN, Circuit Judges; POLSTER, District Judge. *

* The Honorable Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINIONBY:
RYAN

OPINION:

RYAN, Circuit Judge. Jesse Upsher, Annie Abraham, Edward Brodzik, Henry Huczek, Stephen Kalmus, Karen Kohl, Tracy Thacker, and John O'Loughlin (hereinafter collectively referred to as "the plaintiffs") are custodians employed by the Grosse Pointe Public School System. They brought a 42 U.S.C. § 1983 action against the Grosse Pointe Public School System, the Grosse Pointe Board of Education, and various individually named defendants (hereinafter collectively referred to as "the defendants") for alleged injuries from exposure to friable asbestos during a carpet removal job at Grosse Pointe's South High School. Their spouses also brought derivative claims. The district court entered summary judgment for the defendants from which the plaintiffs now appeal.

We must decide whether the plaintiffs' evidence establishes material issues regarding the defendants' liability under both 42 U.S.C. § 1983 and the intentional tort exception to the Michigan Worker's Disability Compensation Act, MICH. COMP. LAWS ANN. § 418.131(1) (MWDCA). We conclude that it does not and therefore we will affirm the judgment of the district court.

I.

FACTUAL BACKGROUND

A.

The Parties

Plaintiffs Annie Abraham, Edward Brodzik, Henry Huczek, Stephen Kalmus, Karen Kohl, and Tracy Thacker were

custodians employed by the Grosse Pointe Public School System in Grosse Pointe, Michigan. Plaintiffs Jesse Upsher and John O'Loughlin were students at South High School and were employed as temporary custodians. Plaintiff Stephen Kalmus was the foreman and supervised the other custodians. Plaintiffs Jeanette Brodzik, Aurelia Huczek, and Catherine Kalmus are spouses of the allegedly injured custodians who asserted derivative claims of loss of consortium.

The individually named defendants are: Dr. Suzanne Klein (assistant superintendent for the School System during the summer of 1995); Christian Fenton (assistant superintendent for business and support services and designated asbestos coordinator for the School System); Paul Pagel (assistant principal at South High School and administrative supervisor of custodians); Mary Beth Herman (principal at South High School); Jay Jeffries (head engineer at South High School); Dr. Edward Shine (Dr. Klein's predecessor); Larry Yankauskas (supervisor of buildings and grounds for the School System); and named, past and present Grosse Pointe school board members: Timothy Howlett, Carl Anderson, Jack Ryan, John Mills, Cynthia Pangborn, Sears Taylor, and Steve Matthews.

B.

The Incident

In early 1995, Grosse Pointe's South High School determined that it would replace the carpeting located in the main office area. Assistant principal Pagel solicited bids from a number of carpeting suppliers and ultimately selected New York Carpet World to remove, replace, and install the new carpeting. After performing initial tests on the vinyl floor tile located beneath the carpeting, New York Carpet World informed Pagel that it refused to complete the project because the machine scrapers it used to remove the carpet might disturb the underlying asbestos-containing tiles. Thereafter, Pagel met with custodial foreman Kalmus, and head engineer Jeffries, and instructed them that South High's custodial staff would complete the carpet removal.

Although the plaintiffs claim that they protested prior to beginning the work, they nevertheless started removing the

carpet around July 19, 1995. When they started to remove the carpet, they noticed that some of the underlying vinyl floor tiles were sticking to the back of the old carpeting. To remove these tiles, the plaintiffs chiseled, chipped, pounded, pulverized, hammered, and jackhammered the tiles causing breakage, flying debris, and dust. The defendants did not provide the plaintiffs with particulate air vacuums to clean up the dust and debris or any protective clothing or respirators. All of the plaintiffs except the two student-plaintiffs had received two hours of asbestos awareness training, but none of them had received the additional 14 hours of training required by the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 40 C.F.R. § 763.92(a)(2), before conducting activities that would result in the disturbance of asbestos-containing building materials (ACBM).

The plaintiffs allege that they suffer from respiratory irritations, posttraumatic stress disorder, and other physical and psychological problems resulting from their exposure to potentially harmful levels of friable asbestos. Subsequent testing conducted by EMSL, an accredited National Voluntary Laboratory Accreditation Program (NVLP) laboratory, located in Ann Arbor, Michigan, revealed that the tiles contained anywhere between 10-25% asbestos. Additionally, the plaintiffs' experts reported that as a result of exposure to the asbestos, the plaintiffs are at a significant increased risk of developing, inter alia, asbestosis, lung cancer, mesothelioma, kidney cancer, leukemia, and lymphoma – all requiring expensive medical monitoring.

The plaintiffs filed a complaint with the Michigan Department of Public Health, which resulted in citations for: (1) failure to perform exposure monitoring to determine the airborne concentrations of asbestos required by the Occupational Safety and Health Administration (OSHA) Asbestos Construction Standard, 29 C.F.R. § 1926.1101(f); and (2) failure to instruct employees in the recognition and avoidance of unsafe conditions involving asbestos and the specific asbestos regulations applicable to the worksite that have been established to control or eliminate the hazards associated with exposure to asbestos. On February 11, 1998, the Environmental Protection Agency (EPA) issued a similar

notice of noncompliance pursuant to Section 15 of the Toxic Substances Control Act (TSCA), as amended, 15 U.S.C. § § 2601-2629, for violations of 40 C.F.R. § 763, Subpart E.

The plaintiffs filed a complaint in the United States District Court for the Eastern District of Michigan alleging violations of: (1) the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. § § 2641-2656; (2) the Asbestos School Hazard Abatement Act of 1984 (ASHAA), 20 U.S.C. § § 4011-4022; (3) Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6973; (4) the Clean Air Act (CAA), 42 U.S.C. § § 7401-7671q; (5) the Solid Waste Disposal Act (SWDA), 42 U.S.C. § § 6901-6992k; (6) the Civil Rights Act, 42 U.S.C. § 1983; (7) strict liability, gross negligence, and willful and wanton misconduct; (8) ultra-hazardous activity; (9) intentional misconduct; and (10) conspiracy. The defendants moved for partial summary judgment, following which, the district court dismissed the plaintiffs' environmental law claims, concluding that the plaintiffs had no private right of action and/or that the plaintiffs had not exhausted their administrative remedies. The court reserved its ruling on the plaintiffs' civil rights claim, the claim of intentional tort, and the accompanying derivative claims until after discovery. Following discovery and upon the defendants' renewed motion for summary judgment, the district court dismissed all of the plaintiffs' remaining claims. The plaintiffs appeal only the district court's grant of summary judgment to the defendants on their 42 U.S.C. § 1983 claim and the intentional tort exception to the MWDCA.

II.

ANALYSIS

This court reviews a district court's grant of summary judgment de novo. Owens Corning v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 257 F.3d 484, 491 (6th Cir. 2001). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Nix v. O'Malley, 160 F.3d 343, 347 (6th Cir. 1998). In reviewing a

motion for summary judgment we draw all justifiable inferences in a light most favorable to the nonmoving party. Elwell v. Univ. Hosps. Home Care Servs., 276 F.3d 832, 837 (6th Cir. 2002).

A.

42 U.S.C. § 1983

First, we review whether the district court erred when it concluded that the plaintiffs' evidence did not sufficiently establish a material issue of fact with regard to the defendants' liability under 42 U.S.C. § 1983. Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (West Supp. 2001).

Consequently, to state a viable claim under 42 U.S.C. § 1983, plaintiffs must produce evidence that: (1) they were deprived of a right, privilege, or immunity secured by the federal Constitution or law of the United States, and (2) the deprivation was caused by a person while acting under the color of state law. Flagg Bros. v. Brooks, 436 U.S. 149, 155-57, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978); see Collins v. City of Harker Heights, Tex., 503 U.S. 115, 120, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). Section 1983 is not self-executing, but rather provides a remedy "'for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 510 U.S. 266, 271, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (citation omitted). The Supreme Court has cautioned courts to carefully scrutinize so-called substantive due process claims brought under § 1983 "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins, 503 U.S. at 125. "It is important, therefore, to focus on the allegations in the complaint to determine how [the plaintiff] describes the constitutional right at stake and what the

[governmental actor] allegedly did to deprive [the plaintiff] of that right." Id.

We begin, therefore, by looking at how the plaintiffs describe the constitutional right at stake in their complaint. The plaintiffs allege that the defendants, in ordering the plaintiffs to remove the asbestos-containing materials, caused injury to the plaintiffs which was "willful, wanton, malicious and demonstrated complete, utter and reckless disregard for [their] health and safety," in violation of § 1983. In their appellate briefing, the plaintiffs clarify that their § 1983 claim rests on Section 1 of the Due Process Clause of the Fourteenth Amendment, specifically the substantive component that protects against deliberate decisions of government officials to "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. We conclude that a "fair reading" of the plaintiffs' complaint, unlike the complaint in Collins, does allege a willful violation. See Collins, 503 U.S. at 125.

Our next inquiry, therefore, is whether the plaintiffs' proof is sufficient as a matter of law to state a question of fact regarding the defendants' liability under 42 U.S.C. § 1983. This court made clear in Lewellen v. Metropolitan Government of Nashville and Davidson County, Tenn., 34 F.3d 345 (6th Cir. 1994), that in a non-custodial setting, in order to establish liability for violations of substantive due process under § 1983, a plaintiff must prove that the governmental actor either intentionally injured the plaintiff or acted arbitrarily in the constitutional sense. Id. at 350-51; see Gazette v. City of Pontiac, 41 F.3d 1061, 1067 (6th Cir. 1994). The Lewellen court expressed doubt as to whether, in a non-custodial case, "deliberate indifference" could give rise to a violation of substantive due process. Lewellen, 34 F.3d at 350 n.4; see Stemler v. City of Florence, 126 F.3d 856, 869 (6th Cir. 1997). We point this out because the district court, in ruling on the defendants' initial motion for partial summary judgment, stated that "the 1983 claim . . . could possibly go forward as a case of deliberate indifference." We believe the more exact standard, announced in Lewellen, is that in order to succeed on a § 1983 claim in a non-custodial setting, a plaintiff must prove either intentional injury or "arbitrary

conduct intentionally designed to punish someone – e.g., giving a worker 'a particularly dangerous assignment in retaliation for a political speech . . . or because of his or her gender.'" Lewellen, 34 F.3d at 351 (quoting Collins, 503 U.S. at 119). Or, as stated in Stemler, a plaintiff must prove "'conscience shocking'" behavior. Stemler, 126 F.3d at 869 (quoting Collins, 503 U.S. at 128).

The plaintiffs urge that the Second Circuit's decision in LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998), requires a reversal of the district court's judgment; however, we conclude that our decision in Lewellen demands the opposite result. In Lewellen, this court considered whether an injured employee could maintain a 42 U.S.C. § 1983 claim after the government decided to build a school in the immediate vicinity of a high voltage conductor line. The plaintiff-employee in Lewellen argued that "if negligence lies at one end of a spectrum and intent at the other . . ., the conduct of the defendants . . . was far enough away from negligence, and close enough to intentional infliction of bodily injury, to constitute a violation of the Constitution." Lewellen, 34 F.3d at 349 (internal citation omitted). Despite uncontested evidence that the applicable safety and electrical code standards had been violated, this court upheld the district court's grant of summary judgment in favor of the government, reasoning that "the defendants obviously did not make a deliberate decision to inflict pain and bodily injury . . . . The defendants may have been negligent, but it is now firmly settled that injury caused by negligence does not constitute a 'deprivation' of any constitutionally protected interest." Id. at 348 (citing Collins, 503 U.S. at 125-27; DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201-02, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989); Daniels v. Williams, 474 U.S. 327, 332, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986)). The Lewellen court recognized that, even assuming that the defendants had been "deliberately indifferent to 'unreasonable risks of harm,'" the defendants would not be liable for a constitutional violation as contemplated by Collins. Lewellen, 34 F.3d at 351.

Similarly, here, we cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the

defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs – conduct which we have recognized may result in the deprivation of a constitutionally protected interest. Id. Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983.

B.

MICH. COMP. LAWS ANN. § 418.131(1)

We next consider whether the district court erred when it concluded that the plaintiffs' evidence did not sufficiently establish a material issue of fact with regard to the defendants' liability under the intentional tort exception to the MWDCA.

As we have said, the plaintiffs' § 1983 claim fails because, in part, they were not able to prove an intentional injury. We recognize it would be anomalous if the plaintiffs' MWDCA claim did not likewise fail, but we nevertheless offer a brief analysis of why, in our estimation, the plaintiffs' proof does not sufficiently state an intentional tort as specifically defined by the MWDCA.

In the early twentieth century, the Michigan legislature implemented a no-fault workers' compensation system as the exclusive remedy for employees injured while on the job. 1912 (1st Ex. Sess.) PA 10, part 1, § 4; 1915 CL 5426. In exchange, employees gave up the right to sue their employers for certain occupational injuries. Bazinau v. Mackinac Island Carriage Tours, 233 Mich. App. 743, 593 N.W.2d 219, 222 (Mich. Ct. App. 1999). Largely in response to the Michigan Supreme Court's decision in Beauchamp v. Dow Chemical Co., 427 Mich. 1, 398 N.W.2d 882 (Mich. 1986), the Michigan legislature amended the MWDCA, excepting intentional torts from MWDCA's exclusive remedy provision. Travis v. Dreis & Krump Mfg. Co., 453 Mich. 149, 551 N.W.2d 132, 139 (Mich. 1996). The amended statute provides, in relevant part:

The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The

only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

MICH. COMP. LAWS ANN. § 418.131(1) (emphasis added).

In the seminal case construing the statute, the Michigan Supreme Court interpreted the amended statute as providing two avenues whereby injured employees can prove an intentional tort. Travis, 551 N.W.2d at 141-43. The first sentence of the intentional tort exception provides: "An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." MICH. COMP. LAWS ANN. § 418.131(1). The Travis court held that this sentence requires that an employee prove that his employer deliberately acted or failed to act with the purpose of inflicting an injury upon the employee. Travis, 551 N.W.2d at 141-42.

An employee can also establish an intentional tort by proving that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MICH. COMP. LAWS ANN. § 418.131(1). This second avenue of proof is "a legislative recognition of a limited class of cases in which liability is possible despite the absence of a classic intentional tort and as a means of inferring an employer's intent to injure from the surrounding circumstances in those cases." Travis, 551 N.W.2d at 143. This approach requires that an employee show that his employer (1) had "actual knowledge"; (2) that an injury was "certain to occur"; and (3) "willfully disregarded that knowledge." MICH. COMP. LAWS ANN. § 418.131(1); see Travis, 551 N.W.2d at 143.

The district court concluded:

There is no question of any fact raised concerning specific intent of the Defendants to cause any injury to the Plaintiffs,

and there's also no question of fact raised of any actual knowledge by the Defendants that an injury was certain to occur, and that they willfully disregarded such knowledge in proceeding to the work assignments of the Plaintiffs.

The plaintiffs did not present any direct evidence that the defendants intended to injure them, but instead offered circumstantial evidence to prove that the defendants had actual knowledge that injury was certain to occur and that the defendants willfully disregarded that knowledge. Our review, therefore, focuses on the district court's conclusion as it relates to this second avenue of establishing an intentional tort – whether the defendants had actual knowledge that injury was certain to occur and willfully disregarded that knowledge.

The plaintiffs rely upon Golec v. Metal Exchange Corporation, 551 N.W.2d 132 (Mich. 1996), the companion case to Travis v. Dreis & Krump Mfg. Co., 453 Mich. 149, 551 N.W.2d 132, a case the Michigan Supreme Court concluded fit within the narrow confines of the MWDCA exception. We do not agree, however, that Golec controls. In Golec, the plaintiff-employee sued for injuries he sustained after an explosion "showered" him with molten aluminum after he loaded wet scrap metal containing aerosol cans into a furnace. Golec, 551 N.W.2d at 136-37. Three hours before this explosion a similar, minor explosion occurred, resulting in slight burns to the plaintiff's left hand. 551 N.W.2d at 137. After this earlier, minor explosion, the plaintiff notified the shift leader who, in turn, notified his immediate supervisor. Id. The supervisor ordered the plaintiff to return to work. Id. The Michigan court held:

When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur.

551 N.W.2d at 145. The court consequently affirmed denial of the defendant's motion for summary judgment because the

"plaintiff [] presented evidence that, despite knowledge of the earlier explosion, defendant failed to remedy the condition that caused it." 551 N.W.2d at 148.

Here, however, even if we assume the asbestos-containing tiles constituted a "continuously operative dangerous condition," a fact we do not resolve, there is no evidence that any of the defendants knew this condition would cause injury and refrained from informing the plaintiffs. The supervisor in Golec ordered the plaintiff to return to work with full knowledge that the operating condition had recently resulted in an injury-causing explosion. Here, the plaintiffs' proof shows merely that: (1) the defendants (and we note only some of the individually named defendants) knew of the general dangers associated with asbestos exposure; (2) the defendants did not provide adequate training regarding the proper method for removing asbestos-containing tiles; and (3) the defendants did not provide adequate protective devices such as clothing, air respirators, air monitoring, and the like. While the defendants' actions may have been negligent, or even grossly negligent, we conclude that the plaintiffs' proof fails to establish that the defendants had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. The plaintiffs, therefore, are subject to the exclusive remedies provided under the MWDCA and may not recover in this action.

III.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANNIE ABRAHAM; EDWARD BRODZIK; JEANETTE BRODZIK; HENRY HUCZEK; AURELIA HUCZEK; STEPHEN KALMUS; CATHERINE KALMUS; KAREN KOHL; TRACY THACKER;
Plaintiffs-Appellants,

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTIAN FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities,
Defendants-Appellees.

ORDER

At a session of said Court held in the Theodore Levin United States Courthouse, in the City of Detroit, Wayne County, Michigan on: MAY 30, 2000

PRESENT: Hon. Anna Diggs Taylor

This matter having come before the Court on Defendants' Renewed Motion for Summary Judgment, for the reasons stated on the record at a hearing held on Monday, May 8, 2000, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' renewed motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint is dismissed with prejudice.

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JESSE UPSHUR,
Plaintiff,

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTIAN FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities,
Defendants-Appellees.

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE ANNA DIGGS TAYLOR, JUDGE

Monday, May 8, 2000 - Detroit, Michigan

this. "I think the answer to your question is that for purposes of determining their need for medical monitoring, that these studies clearly illustrate the increased risk of lung cancer with asbestos exposure, whether it's work-related, non-work-related environmental asbestos exposure, and that the fact that on is exposed to a level above what OSHA believes is a permissible exposure limit, indicates, for my purposes as an occupational environmental medicine doctor, that I can safely provide an opinion that these individuals require medical monitoring."

And based upon the violation of the PEL set by the EPA, he's concluded that they have increased risk of a number of asbestos-related diseases. Some of them are response-related; some of which are not, Your Honor. Thank you.

THE COURT: Thank you. Anything else?

MR. WITTLINGER: No proof of intent.

THE COURT: This is a renewal of a motion that was made earlier for summary judgment in this case, and which the Court, at that time, denied on the basis that the Plaintiff should have opportunity to make complete discovery on their questions that are particularly relevant here of intent, and the facts that will take this case out of the coverage of the Michigan Workers' Compensation law, or other law pertaining to simple negligence.

Discovery has now been concluded, and I think for all of the reasons that have been briefed and answered – briefed and argued by the Defendant, the Court is constrained to grant the motion for summary judgment.

There is no question of any fact raised concerning specific intent of the Defendants to cause any injury to the Plaintiffs, and there's also no question of fact raised of any actual knowledge by the Defendants that an injury was certain to occur, and that they willfully disregarded such knowledge in proceeding to the work assignments of the Plaintiffs.

Also, there is no question of fact raised as to an actual injury presented by any of the Plaintiffs.

For those reasons, and all the others that the Defendant has variably briefed and argued, I have to grant the motion for summary judgment.

MR. WTTTLINGER: Thank you, Your Honor.

MR. CHAFFEE: Thank you.

THE COURT: Present an order, would you?

MR. WITTLINGER: I will. (Proceedings concluded at 11:01 a.m.)

(2)

Supreme Court U.S.
FILED
AUG 2 2002
OFFICE OF THE CLERK

No. 02-35

In The Supreme Court of the United States

JESSE UPSHER; ANNIE ABRAHAM; EDWARD BRODZIK; JEANETTE BRODZIK; HENRY HUCZEK; AURELIA HUCZEK; STEPHEN KALMUS; CATHERINE KALMUS; KAREN KOHL; TRACY THACKER; JOHN O'LOUGHLIN,

Petitioners,

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTINA FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Petitioners are individual residents of the State of Michigan. Petitioner Steven Kalmus is deceased, having died of causes unrelated to this litigation during the pendency of this appeal. The record below, including the complaint filed in the District Court, refers to the first named Petitioner as "Jesse Upshur." However, the Court of Appeals published opinion and this Petition refer to that individual as "Jesse Upsher."

Individual Respondents are residents of the State of Michigan. The Grosse Pointe Public School System is a general powers public school district organized under the laws of the State of Michigan, and is engaged in the operation of public schools in a geographic area in south-eastern Michigan. It has neither parent nor subsidiary corporations and its board members are elected by the public. The Grosse Pointe Board of Education is not a corporate entity and the reference thereto presumably refers to the board members of the Grosse Pointe Public School System or to the Grosse Pointe Public School System itself.

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COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case contains factual allegations not supported by the record before the lower Court and in many instances contrary to such record. Significant examples of these discrepancies are set forth below, and are not meant to be exhaustive.

1. Petitioners rely on deposition testimony of two experts[1] to the effect that Petitioners suffered injury as a result of actions of Respondents, stating that such testimony is unrebutted.

a. In spite of the fact that the medical literature is replete with epidemiologic studies relating to asbestos exposure, Mr. Wabeke testified that he did not review any such studies in connection with his work on this case (Court of Appeals Joint Appendix (C. A. App.) at 675). Mr. Wabeke correctly testified (C. A. App. at 679) that the maximum acceptable time weighted average concentration for occupational exposure to asbestos was one-tenth of a fiber per cubic centimeter of air over an eight-hour period. However, he was unable to provide any testimony as to the amount of asbestos fibers released at Grosse Pointe South High School during the incident in question. He testified as follows (C. A. App. at 681):

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[1] Respondents argued in the Court of Appeals that Petitioners' two proffered experts, by their own admissions, were not qualified to give opinions as their testimony did not meet the requirements of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Q You would have to speculate in order to – to set a figure as to the amount of asbestos fibers released at the Grosse Pointe Schools in 1995; isn't that correct?

A I – yeah, I suppose. One is too many if it's controllable.

Mr. Wabeke further admits that he does not have experience with regard to asbestos remediation involving vinyl asbestos tile (C. A. App. at 683). Mr. Wabeke candidly admits that in order to extrapolate from other fact situations and reach a conclusion about asbestos release in the case at bar would be a "quantum leap" and "speculation." (C. A. App. at 684). Concerning total exposure (as opposed to time weighted average concentration)[2] Mr. Wabeke testifies (C. A. App. at 690) that the maximum total exposure which plaintiffs could have encountered was 14/10,000 of a fiber year. This is a negligible amount compared with the 10 and 20 fiber year exposure of employees that normally occurs in the insulation trade, pipe fitting trade, or other occupations where epidemiologic studies have been undertaken.

b. Dr. Chiodo's opinion was based on epidemiologic studies unrelated to the situation in the case at bar. Dr. Chiodo relied on studies involving asbestos exposure of construction ironworkers and

[2] Time weighted average concentration is the measure of the amount of asbestos fibers in the air at any given time. Total exposure is the amount of asbestos to which a person is exposed during a given period of time.

> Swedish insulation workers, which he readily admitted were not applicable to the case at bar (C. A. App. at 508). Significantly, Dr. Chiodo testified that he had no knowledge and was unable to provide any evidence as to the level of asbestos exposure, if any, encountered by Petitioners. Dr. Chiodo testified (C. A. App. at 504-06) that he did not know the time weighted average concentration to which any of the Petitioners were exposed, nor the total exposure in fiber years of any of the Petitioners.

2. Petitioners state that the carpet removal project lasted ten days. The record reflects that the project lasted no more than four days (C. A. App. at 466, 576, 599-607).

3. Petitioners state that New York Carpet World walked off the project when it discovered that the tiles contained twenty-five percent asbestos. The record establishes that New York Carpet World advised Respondent Pagel that the method they used for removing old carpet was to use a mechanical scraper, and if there were asbestos tiles under the carpeting, that process might disturb the tiles (C. A. App. at 650). This is the reason that the decision was made to remove the carpet by hand, so that the tiles under the carpet would not be disturbed.[3]

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[3] It is unrebutted that no one anticipated that in connection with removal of the carpet, the underlying tiles would be disturbed or would come loose. Petitioners were instructed to remove carpet, not tiles (C. A. App. at 660).

4. Petitioners state that Respondents were aware that tiles would become detached from the floor and would release asbestos fibers. The record reflects that Respondents' only knowledge was that the tiles could contain asbestos. Such knowledge is not equivalent to knowledge that tiles would become detached from the floor or would release asbestos fibers. Only Respondent Jeffries, who was working on the carpet project as the "foreman" was aware that tiles were coming detached from the floor. The record is clear that he was unaware of any danger as a result of such condition and continued working. None of the other Respondents were aware that tiles were becoming detached from the floor until after the project was completed.

5. Petitioners refer to violations received by the Grosse Pointe Public School System in connection with this project. The only two violations received were for failure to conduct air monitoring during the project and failure to instruct employees as to asbestos-related facts. Respondents received no violations in connection with the actual physical removal of the carpet. Provided air monitoring was conducted and proper asbestos instruction was given, the carpet removal project ordered by Respondents and conducted by Petitioners would not have been a violation of any law and would have been permitted to proceed.[4] The particular regulations for which Respondents were cited did not themselves cause any injury to Petitioners.

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[4] Carrying Petitioners' argument to its logical extension leads to the conclusion that under the facts of this case, and assuming air monitoring and proper instruction, Petitioners would have no claim even though their exposure would have been the same.

REASONS FOR DENYING THE WRIT

Petitioners argue that the writ should be granted for three reasons (Petition at 18-19):

1. The decision of the United States Court of Appeals for the Sixth Circuit conflicts with holdings of this Court and other circuits.

2. The decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of the Michigan Supreme Court on Petitioners' state law claims.

3. The United States Court of Appeals for the Sixth Circuit committed plain error.

I. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER CIRCUITS

The only Court of Appeals' opinion cited by Petitioners to support their argument that there is a conflict among the circuits relating to the proper test to be applied in determining a violation of 42 U.S.C. 1983 is *LaBounty v. Coughlin*, 137 F. 3d 68 (2nd Cir. 1998). The Sixth Circuit opinion in this case clarified that different principles would apply in a custodial case, such as *LaBounty, supra.* Eighth Amendment considerations alone may very well dictate a different test being applied in a custodial setting. The Sixth Circuit cites and relies on *Lewellen v Metropolitan Government of Nashville and Davidson County, Tennessee*, 34 F. 3d 345 (6th Cir. 1994) in its holding below that in a non-custodial setting, "plaintiff must prove that the governmental actor either intentionally injured the

plaintiff or acted arbitrarily in the constitutional sense." *Upsher, et al. v. Grosse Pointe Public School System, et al.*, 285 F. 3d 448, 453 (6th Cir. 2002), citing *Lewellen, supra,* at 350-51 and *Gazette v. City of Pontiac,* 41 F. 3d 1061, 1067 (6th Cir. 1994). *LaBounty, supra*, is not in conflict with these decisions, as courts have recognized a key distinction between custodial and non-custodial cases. The Sixth Circuit opinion in this case is entirely consistent with previous appellate decisions, including *LaBounty, supra*, and complies with this Court's pronouncement in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

Having determined that the law requires evidence of conduct "intentionally designed to punish someone" or "conscious shocking" behavior, the Sixth Circuit examines the record and finds no such evidence. An examination of the record below establishes that this conclusion is correct. None of the Respondents (with the exception of Respondent Jeffries) were aware that carpet tiles were becoming detached from the floor. In addition, none of the Respondents (including Respondent Jeffries) were aware of any danger to which Petitioners were exposed. As the Sixth Circuit correctly stated,

> "We cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs – conduct which we have recognized may result in the deprivation of a constitutionally-protected interest. *Id.* Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in

> negligence and not a constitutional tort under Section 1983." (*Upsher, supra*, at 453-54).

Inasmuch as Petitioners have not cited any Court of Appeals' authority in conflict with the Sixth Circuit opinion in this case, the writ should be not be granted.

II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THE MICHIGAN SUPREME COURT

Petitioners' state law claim rests upon the intentional tort exception to the Michigan Worker's Disability Compensation Act (MWDCA), M.C.L.A. 418.131(1). The law relating to the intentional tort exception has been evolving in Michigan since the 1986 decision of the Michigan Supreme Court in *Beauchamp v. Dow Chemical Company*, 427 Mich. 1, 398 N.W. 2d 882 (1986). The law has now been set to rest by the Michigan Supreme Court's dual decisions in *Travis v. Dreis & Krump Manufacturing Company*, and *Golec v. Metal Exchange Corporation*, 453 Mich. 149, 551 N.W. 2d 132 (1996). To establish an "intentional tort" Michigan law requires either:

1. An injury to an employee as a result of a deliberate act of the employer where the employer specifically intended an injury, or

2. An injury to an employee where the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Michigan law also provides that the question of whether or not the facts in a case constitute an intentional tort is a question of law for the court.

The Sixth Circuit, in its analysis of Petitioners' Section 1983 claim, found that the record did not reflect an intentional act as required by 42 U.S.C. 1983. The Court then applied the same rationale to hold that there was no intentional tort. The lack of knowledge of Respondents as to the progress of the carpet project and the failure of Respondents to adequately comprehend any danger (if any such danger existed), requires the conclusion that no intentional tort has been proven, nor can such an intentional tort be established from the state of the record below.

In *Golec, supra*, the employer had knowledge that the condition in the plant which caused injury to the plaintiff had in fact caused a similar injury in the past. In spite of this knowledge and in spite of the history of the respective condition to cause injury, the employee was ordered to continue working. Here, Petitioners were not ordered to remove tile, just carpet, and there was no indication that the tile would become detached with the carpet.

Other Michigan cases decided since *Travis* and *Golec, supra*, hold the same. *Bazinau v. Mackinac Carriage Tours*, 233 Mich. App. 743, 593 N.W. 2d 219 (1999), involved an employee traveling across the ice between Mackinac Island and the mainland in connection with delivering horse feed to Mackinac Island. Plaintiff argued that the intentional tort exception should apply when the vehicle broke through the ice. The Michigan Court of Appeals indicated that evidence of increased risk of injury or increased probability of injury is not admissible, as the injury must be certain to occur. The court held that the intentional tort exception did not apply.

Palazzola v. Karmazin Products, 223 Mich. App. 141, 565 N.W. 2d 868 (1997), involved injuries to an employee cleaning sludge from a tank and being overcome with trichloroethyline fumes. The employee's supervisor was not aware of, nor did he appreciate, the risk. The Michigan Court of Appeals stated that in order to establish an intent to injure, the evidence must show a deliberate act or omission specifically intended to cause an injury by a particular employee. Disconnected testimony by various employees is not sufficient. In *Palazzola, supra*, a case with strikingly similar facts to the case as bar, the supervisor instructed the employees to drain and fill the tank, not to clean the sludge from the tank. In the case at bar, Petitioners were instructed to remove the carpet, not the tile. Also, the foreman in *Palazzola, supra*, was not aware of the danger of the trichloroethyline fumes, and actually was in the tank himself doing work. In the case at bar, Respondent Jeffries, the foreman on the job, was also removing carpet and did not appreciate any danger involved. Holding that the facts did not establish an intentional tort exception to the MWDCA, the Michigan Court of Appeals affirmed the trial Court's dismissal of plaintiff's claim.

Further substantiating the lack of liability of Respondents is the fact that at most, Petitioners were exposed to 14/10,000 of a fiber year, an extremely negligible amount. Also, none of the Petitioners suffer from any medical consequences of asbestos exposure.

The Sixth Circuit opinion below is in accord with applicable Michigan authority, and consequently the writ should not be granted.

III. THE COURT OF APPEALS' OPINION IS IN ACCORDANCE WITH THE LAW ESTABLISHED BY THIS COURT AND BY THE SIXTH CIRCUIT, AND IS NOT "PLAIN ERROR"

Petitioners state that the Sixth Circuit opinion affirming the trial court's dismissal of their 42 U.S.C. 1983 claim was "plain error." However, the Sixth Circuit relies on its previous opinion in *Lewellen, supra,* a case which itself relies on *Collins v. City of Harker Heights, Texas, supra.* Petitioners cite no authority in support of their proposition that the Sixth Circuit committed "plain error" and the Petition does not even address the opinion in *Lewellen, supra.* The Sixth Circuit analysis of *Lewellen, supra,* and its reference to *Collins, supra,* and *Gazette, supra, (Upsher, supra,* at 452-53, provide the best argument as to why the Sixth Circuit opinion is in accord with prior law and not "plain error."

The law establishes that gross negligence is not the type of governmental action needed to support a 42 U.S.C. 1983 claim. Gross negligence is not actionable under 42 U.S.C. 1983 because it is not "arbitrary in the constitutional sense." *Gazette, supra,* at 1067, *Lewellen, supra,* at 350-351. Reckless or grossly negligent conduct (assuming that Petitioners could establish such conduct) is not enough to support a 42 U.S.C. 1983 claim. In *Lewellen, supra,* plaintiff was a construction worker severely injured when his construction materials came into contact with a power line. Plaintiff argued that defendants City and School District should be liable under 42 U.S.C. 1983 because they chose to build a school directly beneath a high voltage line, delayed removal of the line, violated applicable safety and electrical code standards, and willfully

disregarded the high risk of injury. The Sixth Circuit disagreed with the plaintiff's argument in *Lewellen*, *supra*, stating (34 F. 3d at 348):

> . . . [T]he defendants obviously did not make a *deliberate decision to inflict pain* or bodily injury on the plaintiff. The defendants may have been negligent, but it is now firmly settled that *injury caused by negligence does not constitute a 'deprivation' of any constitutionally protected interest.* [Emphasis added]

citing *Collins, supra*; *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); and *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In the instant case Petitioners describe, at best, negligent conduct. Viewing Petitioners' best attempt to paint a grim picture of Respondents' actions in the most favorable light, this Court cannot conclude that Respondents made a deliberate decision to inflict pain upon Petitioners. Petitioners have failed to establish "plain error" and as such the writ should not be granted.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Dated: August 2, 2002